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In the Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS H. FERGUS, and
LOUISE P. BRADSHAW, a/k/a
LOUISE BRADSHAW FERGUS,

Petitioners,

versus

STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1] Does a sentence predicated on all or in part on false unreliable and unsubstantiated information violate due process under the 14th Amendment of the U.S. Constitution?

2] Must the defendant in a pre-sentence hearing bear the burden of proof in rebutting unsubstantiated and unreliable information which may have come to the attention of the sentencing judge?

3] Does the failure of the sentencing Judge to individualize his sentence by not fitting the punishment to the offender rather than the crime violate Article 8 of the U.S. Constitution?

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Petitioners, Thomas H. Fergus, and Louise P. Bradshaw, a/k/a Louise Bradshaw Fergus, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court for the State of Louisiana entered in these proceedings on June 21, 1982, which affirmed the judgment and sentence of the Fourth Judicial District Court for the Parish of Ouachita, State of Louisiana, where petitioners having pled guilty to the crime of attempted distribution of a controlled dangerous substance—marijuana, were each sentenced to five (5) years at hard labor and to pay a fine of $2500 and costs, in default of the payment of fine and costs, to serve one additional year. (Appendix A).

OPINIONS BELOW

The dictated reasons for sentencing as they appear in the record are reprinted in Appendix A.

The opinion of the Supreme Court of the State of Louisiana represented at 418 S. 2d. 594, is reprinted in Appendix B.

The denial of rehearing by the Supreme Court of the State of Louisiana by memorandum is reprinted in Appendix C.

JURISDICTION

The judgment of the Supreme Court of the State of Louisiana was entered on June 21, 1982. A timely petition for rehearing was denied on September 3, 1982, and petition for certiorari was filed within sixty (60) days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

TEXT OF AUTHORITIES INVOLVED

Article VIII of the United States Constitution:

> Excessive bail shall not be required; nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment to United States Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall bridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Code of Civil Procedure, Article 894.1:

A. When a defendant has been convicted of a felony or misdemeanor, the court should impose a sentence of imprisonment if:

(1) There is an undue risk that during the period of a suspended sentence or probation the defendant will commit another crime;

(2) The defendant is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment to an institution; or

(3) A lesser sentence will deprecate the seriousness of the defendant's crime.

B. The following grounds, while not controlling the discretion of the court, shall be accorded weight in its determination of suspension of sentence or probation:

(1) The defendant's criminal conduct neither caused nor threatened serious harm;

(2) The defendant did not contemplate that his criminal conduct would cause or threaten serious harm;

(3) The defendant acted under strong provocation;

(4) There was substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(5) The victim of the defendant's criminal conduct induced or facilitated its commission;

(6) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;

(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the instant crime;

(8) The defendant's criminal conduct was the result of circumstances unlikely to recur;

(9) The character and attitudes of the defendant indicate that he is unlikely to commit another crime;

(10) The defendant is particularly likely to respond affirmatively to probationary treatment; and

(11) The imprisonment of the defendant would entail excessive hardship to himself or his dependents.

C. The court shall state for the record the considerations taken into account and the factual basis therefor in imposing sentence.

STATEMENT OF THE CASE

Your petitioners (hereinafter referred to as defendants), Mrs. Louise P. Bradshaw, now wife of Thomas H. Fergus, and Thomas H. Fergus, were charged by a Bill of Information in Ouachita Parish, State of Louisiana, with the crime of distribution of a controlled substance—marijuana, in violation of LSA R.S. 40:967. This offense took place in Monroe, Louisiana, on or about January 21, 1981.

Both defendants pled "Not Guilty" initially to such charge, but after a plea bargaining agreement, withdrew the plea of "Not Guilty" and entered the plea of "guilty" to the charge of Attempted Distribution of Marijuana.

A pre-sentence investigation was ordered. Upon the filing of the pre-sentence investigation, a Motion to

Traverse such pre-sentence investigation was filed by counsel for the defendants for the reason that such pre-sentence reports were inaccurate and misleading in the following:

1] That the defendant, Louise P. Fergus, was well known in narcotic circles for her illegal activities and had a continuing pattern of such drug activities; and

2] That there was information from a reliable confidential informant that she had been initially contacted by defendant Mrs. Fergus with reference to the marijuana sale.

During trial of the Motion to Traverse, witnesses for defendants testified that they had known them for several years; that they saw them frequently; that they socialized with them but had no knowledge of their being involved in illicit drug activities, and that both defendants had been employed during this period of time and accepted as law abiding citizens of the community. Both defendants also testified during such hearing.

Upon the conclusion of the testimony, the Trial Judge immediately pronounced sentence, giving each defendant five (5) years at hard labor plus a fine of $2500 and costs; the jail sentence being the maximum permitted under the law. (Appendix A).

It is from this sentence that an appeal was taken to

the Louisiana Supreme Court.

The basis for such appeal being:

1] The due process clause of the U.S. Constitution, Article 14, was violated in that:

a] The sentencing procedure of the Trial Judge did not properly individualize reasons for such sentences of each defendant as provided in LCCP Art. 894.1

b] The pre-sentence investigation contained material which is hearsay and unsubstantiated and defendants had the burden of disproving same.

c] The defendants were unable to cross examine the reliable confidential informant whose statements were the basis for the bringing of the charges against them.

2] That the sentences handed down constituted cruel and unusual punishment in accordance with Article VIII of the U.S. Constitution.

Federal constitutional questions were raised in the trial court by counsel for defendants after sentencing as noted on page 288 of the transcript:

"Your honor, at this time if it please the Court, we'd like to notify the Court of our intent to enter orders of appeal to the Louisiana Supreme Court on the basis of excessiveness of sentence which we object to at this point....."

And also in the assignment of errors as contained in transcript 195-196 (Appendix D).

Such constitutional questions were further presented before the Louisiana Supreme Court as evidenced by judgment of that court (Appendix B).

REASONS RELIED ON FOR GRANTING OF WRIT

The Court should grant the writ of certiorari because of the confusion and ambivalence of jurisprudence as to whether due process requires a contradictory pre-sentence hearing; the effect of pre-sentence information which is unreliable and unsubstantiated; and whether the defendant bears the responsibility of rebutting such material misinformation. See *Townsend v. Burke*, 334 U.S. 736, 68 S. Ct. 1252, 92 L.Ed. 1960 (1948); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d. 393 (1977); *U.S. v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d. 592 (1972); *U.S. v. Espinoza*, 481 F.2d. 553 (CA5 1973); *U.S. v. Malcolm*, 432 F.2d. 809, (CA1 1970); *U.S. v. Holder*, 412 F.2d 212, (CA2 1969).

Further, it being the accepted ruling of this Court that "punishment should fit the offender and not merely the crime", (*Roberts v. U.S.*, 100 S.Ct. 1358 (1980), did the Louisiana trial court in its misapplication of LCCP Art. 894.1 violate the due process clause of the 14th Amendment of the U.S. Constitution and result in sentences violative of Article VIII of the U.S. Constitution pro-

hibiting cruel and unusual punishment.

The pre-sentence investigation which was ordered by the trial court contained information to the effect that your defendant, Louise P. Fergus was known in illegal drug circles for her activities, and further, that defendants had made the initial contact with reference to the proposed drug sale. The Motion to Traverse the Pre-Sentence Investigation was granted by the trial court who stated the following on page 267 of the transcript of the record:

> "Now, the Court appreciated the two assertions, or maybe three assertions that are being traversed here, or sought to traverse here...are the aspects of the report indicating that Mrs. Fergus was known in narcotic circles for her illegal activities and also the assertions in the report that...she made the initial contact with the reliable informant and advised at that time that she had pounds of marijuana for sale, is that correct?"

During the course of the Motion to Traverse, no attempt was made by the prosecution to introduce evidence or other information to substantiate the allegations complained of.

In addition to the defendants, four witnesses testified on their behalf who had been familiar with them for a period of time prior to the alleged offense, and who stated to the best of their knowledge, that the defendants were not involved in illegal drug activities. In *Townsend v. Burke, supra*, this Court ruled that due process is violated

when the defendant is sentenced on the basis of such material misinformation. Although, this Court, in *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), seemingly ruled that one should not be sentenced on the basis of material misinformation, nevertheless, it was not a lack of due process to prevent the defendant from inspecting or challenging the information contained in such pre-sentence report.

Since Louisiana does permit such challenge (*State v. Bosworth*, 360 So.2d. 173, (LA 1978) and *State v. Lockwood*, 399 So.2d 190, (LA 1981), and it was granted here, it must be determined that given the information or lack thereof, which is of record in the hearing on the Motion to Traverse the Pre-Sentence Investigation, were the due process rights of the defendants violated by the lack of evidence to substantiate the general statements that defendant Louise P. Fergus was well known in drug circles for her illegal drug activities, or that defendants had made the initial contact in the proposed drug sale?

Under the authority of *U.S. v. Weston*, 448 F.2d.626 (CA9, 1971), serious criminal charges may not be made in pre-sentence reports as was done here, solely on the basis of uncorroborated information of an undisclosed informant or informants, and further, where the defense has challenged the accuracy of the charges, the burden of corroboration must fall upon the prosecution. There, the 9th Circuit concluded that the burden of proving a negative fact should not be placed upon the defendant, and stated that accusa-

tions made in the pre-sentence report should not be relied upon unless "amplified by information such as to be persuasive of the validity of the charges there made."

The law in *Weston, supra,* is followed in *U.S. v. Needles,* 472 F.2d.652 (CA2, 1973), where the Court stated that in those instances where the defendants totally denied a significant charge upon which the sentencing Court sought to rely, that the prosecution should be requested to provide substantiation of the challenged information submitted to the Judge. Unless this is done, defendant is left with the almost impossible burden of attempting to prove a negative.

The decision of the Louisiana Supreme Court herein (Appendix B), stated that the defendant had attempted to disprove the statement that she was known in illegal drug circles by putting witnesses on the stand who had known her for several years. The comments of the Court with reference to this are most important and read as follows:

> "At the hearing, all of the witnesses testified that they had known the defendants for at least a year and had socialized with them frequently. They stated that at no time did they know defendant Bradshaw to be a member of any drug circle. We hesitate to accord much weight to these statements: these witnesses could not have testified as to whether Bradshaw was known in drug circles unless they themselves were in drug circles. But notwithstanding that observation, and assuming that Bradshaw was indeed a foreigner to drug cliques, the sentence meted out to Bradshaw is

supportable by the facts of record and is not excessive."

The above language begs the question, for how else does one go about disproving the allegation complained of, except by producing those people with whom one constantly associates. If in fact, the Louisiana Supreme Court is correct, then the defendants are faced with the question of "how to prove a negative, i.e., that I am not known in drug circles." This is an impossible evidenciary burden.

With reference to the comments of the Court about there being sufficient evidence to justify the sentences meted out by the trial court (which were the maximum), who can determine to what extent the uncorroborated information contained in such pre-sentence report, consciously or unconsciously, affected the trial judge's sentences?

As the Court said in *U.S. v. Espinoza, supra*, "sentences cannot be predicated on false information. We extend it but a little in holding that a sentence cannot be predicated on so little value as that therein involved. A rational penal system must have some concern for the accuracy of information and input of the sentencing process."

It should be noted that in his reasons for sentencing (Appendix A), despite his previous statement with reference to the purpose of the pre-sentence hearing, the Trial Judge makes no statement as to his findings as a

result of the hearing; no comment with reference to lack of appearance of the confidential reliable informant, or whether or not in truth the defendants were known in illegal drug circles. One is unable to ascertain how the testimony was evaluated by him, and there is a reasonable probability that his sentencing discretion was at least unconsciously influenced by the gross misinformation of constitutionally prejudicial magnitude contained in the presentence report.

With reference to the individualization of sentences, this Court's attention is invited to Appendix E and F, the printed forms which the trial judge used to insure his compliance with LCCP 894.1. If this form had been used properly, it certainly would have met the requirements of Federal due process as well as Louisiana procedure, but a casual reading will show that many mitigating circumstances with reference to both defendants were not considered.

Thomas H. Fergus had an honorable military record, a good educational background, good employment record and other than the present episode, had not been involved with the law in any way.

Mrs. Louise P. Fergus it is true, had two previous convictions; one for possession of a small amount of marijuana, and one for forgery of a small check for which she had made restitution. The last of these offenses was some seven (7) years prior to the present incident. There is no

mention made of her community activities, her attempts to counsel and advise young people, and other evidence which intended to show that she had put her past behind her.

It is inconceivable with such varied backgrounds, the Judge should have awarded both the maximum sentences by law.

Both the trial judge and the Louisiana Supreme Court stated that considerable leniency had already been extended to each defendant through plea bargaining, which allowed them to plead guilty to attempted distribution of marijuana. Such statement has almost become rote with many courts in attempts to justify the severity of sentences. As a practical matter, such statement is incorrect because plea bargaining is the result of many factors, and the fact that the defendants were permitted to plead to a lesser offense which makes them eligible for a lesser sentence is only one such factor. Crowded dockets, non-availability of witnesses by the prosecution, a weak case by the prosecution on the original charges, and attempts by the prosecution to maintain a high level of convictions are also some of the many reasons used for plea bargaining.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Louisiana Supreme Court not only to correct the manifest errors of fact and law contained therein, but to resolve the constitutional questions involved in pre-sentence procedure which here has resulted in excessive and cruel punishment to both defendants, and violative of the due process clause of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 1982, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Levalle B. Salomon, Assistant District Attorney, Fourth Judicial District Court, P.O. Box 1652, Ouachita Parish, Monroe, Louisiana, and Ms. Barbara B. Rutledge, Assistant Attorney General, 234 Loyola Avenue, Suite 821, New Orleans, Louisiana, 70112.

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APPENDIX "A"

TRANSCRIPT IN PROCEEDINGS NO. 39951

FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF OUACHITA

STATE OF LOUISIANA

VS.

LOUISE P. BRADSHAW and THOMAS H. FERGUS

By the Court:

Let's take up first the sentencing matter. This is the case of State versus Louise P. Bradshaw and Thomas H. Fergus...No. 39,951. Mr. Fergus and Ms. Bradshaw, who is now Mrs. Fergus, previously appeared before this Court and entered a plea of guilty to the offense of attempted distribution of marijuana. Since that time the Court has...received a pre-sentence report prepared by the Division of Probation and Parole setting forth the facts and circumstances of this offense and the prior history of conduct of these two individuals, and on this date there was a motion to traverse certain assertions in that report and the Court has heard testimony here today with respect to that. This offense involved the sale of some fifty (50) pounds of marijuana which was brought here to this parish from Texas, by these defendants....to be sold to an undercover agent for the price of $14,750.00. The report reveals and

the testimony at the hearing today revealed that about two weeks prior to this particular offense that these defendants sold a pound of marijuana to the same narcotics officer in Forney, Texas, and further that on at least one previous occasion they had purchased a pound of marijuana, which they shared with their friends. With respect to Ms. Bradshaw, or now Mrs. Fergus, she was convicted in Dallas County, Texas in 1971 of possession of a narcotic, a felony offense, and in 1972 was convicted of a worthless check offense in the same county, and is thus ineligible for probation. In addition to the other transactions with marijuana, the two defendants had also discussed with the undercover officer and had agreed to a future sale of a similar quantity of marijuana, that is approximately fifty (50) pounds. Any sentence less than what this Court will impose here would depricate the obvious seriousness of this offense. This Court, of course, does not condone the sale of marijuana in any quantity, but certainly in the quantity of this magnitude. It can be expected that it has a definite impact on this community. The Court must confess that it has some difficulty in appreciating the rationale of one of the defendants who stated this morning that her life was very clean, when obviously this quantity of marijuana coming into a community would cause the lives of any number of individuals not to be, quote, clean, once this fifty (50) pounds of marijuana left the control of these two defendants, regardless of what their intentions may have been, they had no control over what happened to it. Mr. Fergus has admitted that his motive was simply profit, that this was a business transaction. The Court also has some dif-

ficulty in understanding the rationale of Mrs. Fergus, while she fastidiously avoided handling the marijuana, she very reluctantly, according to her, agreed to handle the $14,000.00 involved. In this matter, as to each defendant, let the defendant be sentenced to serve a term of five (5) years imprisonment at hard labor and remanded to the custody of the Louisiana Department of Corrections, and to pay a fine of $2,500.00 and costs, in default of payment of fine and costs to serve one year in jail.

APPENDIX "B"

SUPREME COURT OF LOUISIANA

NO. 81-KA-2633

STATE OF LOUISIANA

VS.

THOMAS H. FERGUS AND
LOUISE P. BRADSHAW, A/K/A
LOUISE BRADSHAW FERGUS

AN APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF OUACHITA, STATE OF LOUISIANA, NO. 39951, THE HONORABLE LEMMIE O. HIGHTOWER

AUGUSTINE, Justice ad hoc*

Defendants Louise P. Bradshaw and Thomas H. Fergus were charged by bill of information with having violated La. R.S. 40:967, governing distribution of marijuana, a controlled dangerous substance.

At arraignment on January 28, 1981, both defendants pleaded not guilty. Later, as a result of plea bargaining, the defendants were allowed to withdraw their former pleas and enter pleas of guilty to attempted distribution of

* Judge Gaudin of the 5th Circuit Court of Appeal and Judges Ciaccio and Augustine of the Court of Appeal, Fourth Circuit, participated in this opinion as associate justices ad hoc, joined by Chief Justice Dixon, and Associate Justices Marcus, Blanche and Watson.

marijuana. The trial judge scheduled a pre-sentence investigation as to each defendant, and on August 5, 1981, upon review of the investigation reports, the trial court sentenced each defendant to serve five years at hard labor and to pay a fine of $2,500.00 and costs.

The operable facts in this case are as follows:

In December 1980, Detective Bryan Boney of the West Monroe Police Department was told by a confidential informant that a former friend had telephoned and inquired as to the informant's interest in obtaining large quantities of marijuana. On January 8, 1981 Detectives Boney and Pat Stewart were introduced to the female friend named "Stormy" over the telephone. During their initial conversation, the central topic was the eventual sale of marijuana. Discussion included prices, quantities and grades of marijuana to be supplied to the officers by the defendants within the near future. Further taped conversations became more detailed to include the various logistic problems associated with the deal—transportation of the marijuana from Dallas to Monroe, Louisiana; finance of the venture, etc.

The January 8th conversation was not limited to generalities, however, for it was there agreed that the next day, January 9th, Officers Boney and Stewart were to travel to Fourney, Texas, outside Dallas, to purchase one pound of marijuana from the defendants as a show of good faith. The January 9th transaction was perfected on schedule.

Later, on January 20, 1981, having worked out details of another transaction with the officers by telephone, Fergus and Bradshaw travelled in two vehicles from Fourney, Texas to West Monroe, Louisiana, to conclude the first of two scheduled deliveries. The terms of the agreement had called for two separate shipments, each for fifty pounds of marijuana, at the rate of $14,750.00 per shipment. The second shipment was agreed to follow the first by less than twenty-four hours.

Fergus and Bradshaw arrived in West Monroe at approximately 1:30 a.m. on January 21st. As pre-arranged, Bradshaw checked in at a Roadway Inn Motel, while Fergus drove around the vicinity in the marijuana-laden automobile awaiting Bradshaw's C.B. radio communications. Finally, Bradshaw met Officer Pat Stewart in room 145 and the money changed hands. Stewart turned over the agreed-upon $14,750.00; Bradshaw in turn called Fergus on the C.B. and instructed him to deliver the fifty pound shipment. When Fergus arrived minutes later, he backed the car up to the motel room, opened the trunk and showed Officer Stewart a number of large garbage bags which contained the contraband. Stewart verified that it was marijuana, then gave the signal to other policemen to converge. The defendants were then arrested for distribution of marijuana.

ASSIGNMENT OF ERROR NO. 1 & NO. 2

By these assignments, defendants urge that in sen-

tencing them, the trial judge failed to comply with the requirements of Louisiana Code of Criminal Procedure, Art. 894.1 and that as a result, their sentences are excessive. We shall treat these assignments together.

Art. 894.1 of the Code of Criminal Procedure establishes sentencing guidelines which the trial courts of this state are required to follow. paragraphs "A" and "B" of that statute define the aggravating and mitigating factors which shape the trial court's great sentencing discretion. Paragraph "C" of the statute provides that the court shall state for the record the consideration taken into account and the factual basis therefor in imposing sentence.

Appellants argue that the trial judge failed to adequately consider several mitigating factors as to each defendant, and failed to state for the record the factual basis for the imposition of these sentences. Ultimately, it is urged that the chief error of the sentencing procedure was the trial court's failure to *particularize* each defendant's sentence. Appellants point to the fact that each defendant received the same sentence although there were great differences in their backgrounds, criminal histories, and their degrees of participation in the offense now under our consideration.

The record reveals that the trial court signed into the record a full and detailed statement of the facts of this case. The trial court also submitted to the record a printed form entitled, "Statement of Considerations as to Sentence

of Imprisonment". That form contains a listing of each of the mitigating factors found in Paragraph "B" of Art. 894.1. There is also a space provided where the trial judge indicates his opinion as to the presence or absence of the mitigating factors. Beneath the listing of those factors are the trial court's particular comments regarding mitigating circumstances.

As to the defendant Thomas Fergus, the trial court noted on the form its conclusion that there existed no mitigating factors. In a footnote, the trial judge noted that although Fergus had no prior criminal convictions, there was certainly prior criminal conduct: "About two weeks prior to the instant offense, defendant and his co-defendant sold a pound of marijuana to a narcotics officer in Fourney, Texas, and on at least one previous occasion they had purchased a pound of marijuana which they shared with their friends." The court also specifically noted that Fergus and Bradshaw had agreed to a future sale of a similar (approximately fifty pounds) quantity of marijuana, and that a lesser sentence would deprecate the seriousness of the offense, particularly considering that Fergus' only motive was quick profit. The record reveals that while it was Bradshaw who had a dealer's expertise, it was Fergus' avarice which fueled the venture, though it caused great personal friction with Bradshaw, whose resistance to the operation met Fergus' constant pressure to carry through with the deal.

We now turn to the trial court's procedure in sen-

tencing the defendant Bradshaw. The record contains a form identical to that submitted for Fergus, as discussed above. The trial judge found none of the mitigating factors of Art. 894.1 (B) to be applicable, and as in the case of Thomas Fergus, noted the sale of a pound of marijuana two weeks prior to the instant offense and, before that, the purchase of a pound of marijuana which was shared with the couple's friends. The court stated that a lesser sentence would deprecate the seriousness of the offense, which itself was only half of the operation—the second shipment having been totally finalized except for delivery. The court noted that defendant Bradshaw, unlike Fergus, had two prior convictions, one for possession of narcotics.

We think the trial court's sentencing procedure as to each defendant adequately followed the guidelines of Art. 894.1. Although appellants object to the trial court's use of a printed form (described above), we fail to see the basis for such an objection and regard it, together with the trial court's comments thereon, as evidence that the sentencing judge considered each and every mitigating factor in paragraph "B" of Art. 894.1. The court's conclusion that imprisonment was required as to each defendant was grounded upon a statement that a lesser sentence would deprecate the seriousness of the offense, this statement in turn supported by reference to the rather large size of the operation and its very noxious effect upon the community in the event that it were carried through. Moreover, the trial court noted that considerable leniency had already been extended to each defendant through plea bargaining

which allowed them to plead guilty to attempted distribution.

The record adequately states the court's sentencing considerations, as well as the factual bases therefor. This court has said that Article 894.1 does not require the trial judge to set forth for the record all the factors listed in said statute which were accorded weight by him in determining to impose a sentence of imprisonment rather than grant suspension of sentence or probation. *State v. Jacobs,* 383 So. 2d 342 (La. 1980). From this, it follows that the requirements of Art. 894.1 are met if, on a printed form, the trial court sets forth the lack of all mitigating factors, and as to at least some of those factors, articulates his reasons.

We now consider whether the sentences in this case are excessive. A sentencing judge is accorded great discretion, and absent a finding by this court that the punishment is grossly out of proportion to the offense, or a purposeless imposition of pain and suffering, we will not disturb the trial court's decision. *State v. Bonanno,* 384 So.2d 355 (La. 1980); *State v. Goode,* 380 So. 2d 1361 (La. 1980); *Gregg v. Georgia,* 96 S.Ct. 2909 (1976).

As already noted, the defendants had already been allowed a considerable degree of leniency by virtue of their plea bargain which reduced the charges. Ms. Bradshaw is now a third felony offender whose expertise in narcotics traffic was indispensible to the perfection of the deal by which it was agreed to ship 100 pounds of marijuana for a

total price of almost $30,000.00. Thomas Fergus, though lacking Bradshaw's expertise, was no less involved in the crime than she. In a sense, his culpability is even greater, due to the relentless pressure he exerted upon Bradshaw to carry through with the operation.

Given that the facts of this case would have allowed the State to have charged these defendants more heavily than they were, and given that the defendants received even further leniency by the plea bargain, we do not regard either defendant's sentence as excessive.

ASSIGNMENT OF ERROR NO. 3

By this assignment of error, defendants contend that the trial court erred in relying on prejudicially false information contained in the pre-sentence investigation report.

The claimed falsehoods are, first, that it was Bradshaw, and not the informant, who had been the one to initiate negotiations as to the drug deal, and second, that Bradshaw was known in drug circles in the Dallas area.

Prior to sentencing, appellants filed a motion to traverse the pre-sentence investigation report, and an evidentiary hearing was subsequently held, as required by *State v. Bosworth*, 360 So. 2d 173 (La. 1978) and *State v. Lockwood*, 399 So. 2d 190 (La. 1981).

At the hearing, all of the witnesses testified that

they had known the defendants for at least a year and had socialized with them frequently. They stated that at no time did they know defendant Bradshaw to be a member of any drug circle. We hesitate to accord much weigh to these statements: these witnesses could not have testified as to whether Bradshaw was known in drug circles unless they themselves were in drug circles. But notwithstanding that observation, and assuming that Bradshaw was indeed a foreigner to drug cliques, the sentence meted out to Bradshaw is supportable by the facts of record and is not excessive.

For the reasons assigned, the judgment of the trial court fixing sentence as to each defendant is affirmed.

AFFIRMED

APPENDIX "C"

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE
NEWS RELEASE # 92

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On September 3, 1982, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr., and Associate Justices Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennie, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

* * * * * *

REHEARINGS DENIED:

* * * * * *

81-KA-2683 State v. Louise Bradshaw & Thomas H. Fergus

APPENDIX "D"

STATE OF LOUISIANA
PARISH OF OUACHITA
FOURTH JUDICIAL DISTRICT COURT

STATE OF LOUISIANA FILED: August 12, 1981

VERSUS NO. 39,951

THOMAS H. FERGUS and
LOUISE P. BRADSHAW aka
LOUISE BRADSHAW FERGUS

ASSIGNMENT OF ERRORS

NOW INTO COURT comes THOMAS H. FERGUS and LOUISE P. BRADSHAW, aka LOUISE BRADSHAW FERGUS, Defendants herein, and represented through undersigned counsel and respectfully assign the following errors for their appeal to the Louisiana Supreme Court:

1.

The District Court Judge, The Honorable Lemmie O. Hightower, erred in imposing the maximum sentence of five (5) years each at hard labor upon Defendants herein in light of a generally favorable pre-sentence report, considering the nature of the offense, and further due to the fact that evidence introduced at the Motion to Traverse Pre-Sentence Report indicated, per defense witnesses, (1) that when Defendants and the State's reliable confidential in-

formant conversed regarding the delivery of drugs to Ouachita Parish, Defendants did not have custody, control or immediate access to the contraband involved in these proceedings and in fact, Defendant, THOMAS H. FERGUS, had to search for a considerable period of time to locate same, and (2) pursuant to uncontradicted testimony offered by Defendant, LOUISE P. BRADSHAW aka LOUISE BRADSHAW FERGUS, it was the reliable confidential informant who first suggested to Defendants the particular drug purchase involved herein.

2.

The sentence imposed is harsh and excessive and therefore unconstitutional in that the sentence imposed violates Article 1, Section 20 of the Louisiana Constitution of 1974 which provides that no laws shall subject any person to euthenasis, to torture, or to cruel, excessive or unusual punishment; that the sentence imposed of five (5) years and $2,500.00 fines each and in default thereof a sentence of one (1) year additional imprisonment each is harsh and excessive as being in further violation of the Eighth Amendment to the United States Constitution.

3.

The District Court erred in its failure to fully comply with LSA-C.Cr.P. Article 894.1 in the consideration and imposition of sentence, particularly with the enumeration of mitigating circumstances therein contained.

Respectfully submitted,

GUERRIERO, SMITH, HINGLE
& ANZALONE
(A Professional Law Corporation)
Post Office Drawer 1542
Monroe, Louisiana 71201

BY: _____
J. RANDOLPH SMITH

CERTIFICATE

I hereby certify that a copy of the above and foregoing Assignment of Errors has been served upon the Honorable Lemmie O. Hightower, District Judge, and the Honorable Lavelle Salomon, Assistant District Attorney in and for Ouachita Parish, Louisiana, by placing same in the United States Mail, postage prepaid.

Monroe, Louisiana, this 10 day of August, 1981.

_____
J. RANDOLPH SMITH

STATE OF LOUISIANA
PARISH OF OUACHITA
FOURTH DISTRICT COURT

STATE OF LOUISIANA FILED: Sept. 16, 1981

VERSUS NO. 39,951

THOMAS H. FERGUS AND
LOUISE P. BRADSHAW aka
LOUISE BRADSHAW FERGUS DEPUTY CLERK

PER CURIAM TO
ASSIGNMENT OF ERROR NOS. 1, 2 AND 3

A statement of considerations as to sentence was filed of record, and also verbalized, at time of sentencing.

_____

LEMMIE O. HIGHTOWER, JUDGE

APPENDIX "E"

STATE OF LOUISIANA
PARISH OF OUACHITA
FOURTH DISTRICT COURT

STATE OF LOUISIANA FILED: August 5, 1981

VERSUS NO. 39,951

LOUISE POWELL BRADSHAW DEPUTY CLERK

STATEMENT OF CONSIDERATIONS AS TO SENTENCE OF IMPRISONMENT

Pursuant to Act No. 635 of 1977, the Court, in imposing a sentence of imprisonment, has determined whether the following mitigating grounds are present:

	Present	Not Present
1) The defendant's criminal conduct neither caused nor threatened serious harm;	( )	(X)
2) The defendant did not contemplate that the criminal conduct would cause or threaten serious harm;	( )	(X)
3) The defendant acted under strong provocation;	( )	(X)
4) There was substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;	( )	(X)

5)	The victim of the defendant's criminal conduct induced or facilitated its commission;	( )	(X)
6)	The defendant has compensated or will compensate the victim for the damage or injury that was sustained;	( )	(X)
7)	The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before commission of the instant crime;	( )	(X)*
8)	The defendant's criminal conduct was the result of circumstances unlikely to recur;	( )	(X)
9)	The character and attitudes of the defendant indicate that he is unlikely to commit another crime;	( )	(X)
10)	The defendant is particularly likely to respond affirmatively to probationary treatment; and	( )	(X)**
11)	The imprisonment of the defendant would entail excessive hardship to himself or his dependants.	( )	(X)

*About two weeks prior to the instant offense, defendant and her co-defendant sold a pound of marijuana to a narcotics officer in Forney, Texas, and on at least one pre-

vious occasion they had purchased a pound of marijuana which they shared with their friends.

The Court also concludes as follows:

a) A lesser sentence would deprecate the seriousness of the offense, which involves the distribution of over fifty (50) pounds of marijuana for profit (price: $14,750) after transporting the substance to Monroe from the Dallas, Texas area.

**Defendant and her co-defendant had discussed with the undercover officer, and had agreed to, a future sale of a similar (approximately 50 pounds) quantity of marijuana.

b) Considerable leniency has already been extended the defendant through plea bargaining which allowed her to plead guilty to attempted distribution.

c) In 1971, the defendant was convicted in Dallas County, Texas, of possession of a narcotic, a felony offense, and in 1972, was convicted of a worthless check offense in the same county, and thus is ineligible for probation.

Dated: August 5, 1981

/S/ LEMMIE O. HIGHTOWER
LEMMIE O. HIGHTOWER, JUDGE

APPENDIX "F"

STATE OF LOUISIANA
PARISH OF OUACHITA
FOURTH DISTRICT COURT

STATE OF LOUISIANA FILED: August 5, 1981

VERSUS NO. 39,951

THOMAS HAMILTON FERGUS DEPUTY CLERK

STATEMENT OF CONSIDERATIONS AS TO SENTENCE OF IMPRISONMENT

Pursuant to Act No. 635 of 1977, the Court, in imposing a sentence of imprisonment, has determined whether the following mitigating grounds are present:

	Present	Not Present
1) The defendant's criminal conduct neither caused nor threatened serious harm;	( )	(X)
2) The defendant did not contemplate that the criminal conduct would cause or threaten serious harm;	( )	(X)
3) The defendant acted under strong provocation;	( )	(X)
4) There was substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;	( )	(X)

5)	The victim of the defendant's criminal conduct induced or facilitated its commission;	( )	(X)
6)	The defendant has compensated or will compensate the victim for the damage or injury that was sustained;	( )	(X)
7)	The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before commission of the instant crime;	( )	(X)*
8)	The defendant's criminal conduct was the result of circumstances unlikely to recur;	( )	(X)
9)	The character and attitudes of the defendant indicate that he is unlikely to commit another crime;	( )	(X)
10)	The defendant is particularly likely to respond affirmatively to probationary treatment; and	( )	(X)**
11)	The imprisonment of the defendant would entail excessive hardship to himself or his dependants.	( )	(X)

*About two weeks prior to the instant offense, defendant and his co-defendant sold a pound of marijuana to a narcotics officer in Forney, Texas, and on at least one pre-

vious occasion they had purchased a pound of marijuana which they shared with their friends.

The Court also concludes as follows:

a) A lesser sentence would deprecate the seriousness of the offense, which involves the distribution of over fifty (50) pounds of marijuana for profit (price: $14,750) after transporting the substance to Monroe from the Dallas, Texas area.

**Defendant and his co-defendant had discussed with the undercover officer, and had agreed to, a future sale of a similar (approximately 50 pounds) quantity of marijuana.

b) Considerable leniency has already been extended the defendant through plea bargaining which allowed him to plead guilty to attempted distribution.

c) The above considerations outweigh the fact that this is the first felony of which the defendant has been convicted.

Date:

/S/ LEMMIE O. HIGHTOWER
LEMMIE O. HIGHTOWER, JUDGE